No. 10-385

In the Supreme Court of the United States

JAMES E. JACKSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's submission of false timesheet information to a subcontractor providing services under a government contract with the National Security Agency (NSA) concerns a "matter within the jurisdiction of the executive * * * branch," 18 U.S.C. 1001(a), where the false information was transmitted to the NSA and caused the NSA to pay for services that it never received.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 608 F.3d 193. The opinion of the district court (C.A. J.A. 204-208) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2010. A petition for a writ of certiorari was filed on September 17, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following the entry of a conditional guilty plea in the United States District Court for the District of Maryland, petitioner was convicted on three counts of knowingly and willfully making material false statements in a matter within the jurisdiction of the executive branch

of the Government of the United States, in violation of 18 U.S.C. 1001. The district court sentenced petitioner to 30 days of imprisonment, to be followed by two years of supervised release, and ordered petitioner to pay $74,346 in restitution. C.A. J.A. 241-245. The court of appeals affirmed. Pet. App. 1-17.

1. In or about July 2003, the National Security Agency (NSA), a component of the United States Department of Defense, entered into a contract with Computer Sciences Corporation to obtain certain messaging services. Computer Sciences Corporation entered into a subcontract with a division of Northrop Grumman Corporation to provide services to the NSA under the NSA contract. Northrop Grumman, in turn, employed petitioner to work full-time on the NSA contract. Pet. App. 5; C.A. J.A. 217.

Petitioner's sole duty station with respect to the NSA contract was at the NSA's headquarters at Fort Meade, Maryland, and petitioner was required to be at that duty station in order to work on the contract. Petitioner's access to NSA Headquarters and the classified information necessary to perform his job was subject to a continuing grant of access by the NSA. The NSA possessed authority to suspend or revoke that grant of access to petitioner if, for instance, it determined that petitioner had submitted timesheets falsely claiming to have performed work under the NSA contract that he did not actually perform. The NSA also possessed authority to obtain directly the timesheets and billing records relating to petitioner in order to investigate an allegation suggesting that petitioner had submitted false timesheets. The NSA then could have resolved any associated overpayment by demanding repayment from Computer Sciences Corporation and could have terminated

its contract with that company if such deficiencies with subcontractor personnel were not adequately remedied. Pet. App. 5-7, 12; C.A. J.A. 217-218.

Between September 2004 and January 2007, petitioner submitted numerous false timesheets to Northrop Grumman that fasely claimed that petitioner had worked roughly 834 more hours on the NSA contract than he actually had worked. Pet. App. 5-6. That false information was then "transmitted * * * to NSA," which paid Computer Sciences Corporation for the falsely claimed services. *Id.* at 6, 17. Petitioner's false statements ultimately caused the government to pay approximately $74,346 for services that it never received. C.A. J.A. 245; cf. *id.* at 218.

2. In March 2009, a federal grand jury indicted petitioner on 20 counts of knowingly and willingly making false statements, in violation of 18 U.S.C. 1001, by submitting 20 fraudulent timesheets for 20 different pay periods. C.A. J.A. 7-11. As relevant here, Section 1001 provides that "whoever, in any matter within the jurisdiction of the executive * * * branch of the Government of the United States, knowingly and willfully—* * * (2) makes any materially false, fictitious, or fraudulent statement or representation" shall be fined, imprisoned, or both. 18 U.S.C. 1001(a).

Petitioner moved to dismiss the indictment, arguing that his timesheets did not reflect false statements in a matter within the jurisdiction of the executive branch within the meaning of Section 1001. C.A. J.A. 12-23. The district court denied the motion. *Id.* at 204-208. The court concluded that petitioner's alleged submission of false timesheet information to Northrop Grumman, which allegedly caused the NSA to pay Computer Sciences Corporation for time that petitioner falsely

claimed to have worked, itself provided "the required jurisdictional nexus" under Section 1001 because the false statements were made in a matter "within the jurisdiction of NSA." *Id.* at 206. The district court noted that "[c]ourts do not require that a federal agency have any direct supervisory power over a defendant in order to have jurisdiction under § 1001," *ibid.*, and concluded that there were "a myriad of other ways" in which the NSA had authority with regard to petitioner's alleged false statements beyond the NSA's responsibility for its payment of funds. *Id.* at 207. The NSA, the court explained, had authority effectively to "end[] [petitioner's] work on the contract" for submitting false timesheet information because it "could have suspended or revoked [his] access to NSA facilities and information" for such conduct. *Ibid.* The court also concluded that the NSA "had the option of terminating its contract with" Computer Sciences Corporation based on deficiencies caused by an employee of the company's subcontractor. *Id.* at 207-208.

Petitioner subsequently entered into a conditional plea agreement under which he agreed to plead guilty to three of the 20 counts of the indictment while reserving his right to appeal from the order denying his motion to dismiss. C.A. J.A. 209-219; cf. *id.* at 217-219 (stipulation of facts). The district court accepted petitioner's conditional guilty plea and found petitioner guilty on three counts of making false statements, in violation of 18 U.S.C. 1001. C.A. J.A. 237, 241.

3. The court of appeals affirmed. Pet. App. 1-17. The court of appeals concluded that petitioner's "false timesheets fell within the jurisdiction of the executive branch." *Id.* at 9. The court agreed with other courts of appeals that "the executive branch has the authority (if

not the duty) not to pay a false invoice, no matter through how many intermediaries' hands it passes" and that the submission of such a false statement prompting a federal payment falls within the ambit of Section 1001. *Id.* at 9-10, 11 n.1. Such a false statement is a statement in a matter within the jurisdiction of the executive branch, the court explained, because "the authority to safeguard federal funds" is not "merely peripheral, but rather [is] an official, authorized function of the executive branch." *Id.* at 11.

Although it reasoned that "the executive branch's authority to safeguard federal funds is a sufficient jurisdictional nexus on its own," the court of appeals also concluded "other, even more direct controls that the executive branch exercised over [petitioner]" demonstrated that petitioner's false statements were made in a matter within the jurisdiction of the executive branch. Pet. App. 12. The court explained that the NSA had the power to "effectively terminate [petitioner's] employment" working on the NSA contract, by revoking his security clearance and preventing his access to his job site at NSA Headquarters. *Ibid.* That control, when "[t]aken together" with the NSA's right to terminate its contract with Computer Sciences Corporation and its "power to safeguard federal funds," provided "an ample basis to find federal jurisdiction" under Section 1001. *Ibid.*

The court of appeals rejected petitioner's reliance on *Lowe* v. *United States*, 141 F.2d 1005 (5th Cir. 1944), and *United States* v. *Blankenship*, 382 F.3d 1110 (11th Cir. 2004), cert. denied, 546 U.S. 828 (2005). Pet. App. 12-16. The court explained that *Lowe* was distinguishable from petitioner's case because, although it involved false statements made by the employee of a private com-

pany that had contracted with the United States, the employee's "employment was entirely unaffected by the existence of the federal contract." *Id.* at 15. The court similarly concluded that *Blankenship* was inapposite. In *Blankenship*, the false statements related to a scheme whereby a minority-owned business pretended to do work that was actually performed by a non-minority business. The minority-owned business subcontracted with a contractor that in turn contracted with the State of Florida, which in turn had received federal money requiring the involvement of minority-owned businesses in the project. As the court of appeals in this case explained, the federal agency in *Blankenship* "had no direct control over the defendants" and could have responded to the false statements only by attempting to pressure a state agency to exert pressure on the private company with which the state had contracted in order to take action against the subcontractor and those who had made the false statements at issue. *Id.* at 14-16.

ARGUMENT

Petitioner contends (Pet. 6-14) that his false statements concerning the time that he worked on the NSA contract fall outside the jurisdictional reach of 18 U.S.C. 1001 because they do not constitute statements in a "matter within the jurisdiction of the executive * * * branch," 18 U.S.C. 1001(a). That is incorrect. The court of appeals correctly held that Section 1001's jurisdictional predicate was satisfied in this case, and the court's decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. Section 1001 requires that a knowingly and willfully false statement must be made "in a[] matter within

the jurisdiction of the executive * * * branch of the Government of the United States." 18 U.S.C. 1001(a). The "primary purpose" of that "jurisdictional requirement" is "to identify the factor that makes the false statement an appropriate subject for federal concern." *United States* v. *Yermian*, 468 U.S. 63, 68 (1984). Petitioner's false statements regarding the time that he purportedly worked on an NSA contract were transmitted to the NSA and directly caused the Executive Branch to pay for services that it never received. Those false statements plainly concern an appropriate subject for federal concern and fall within the reach of Section 1001's jurisdictional threshold.

Section 1001's direct statutory predecessor originally applied only to false statements that caused "pecuniary or property loss" to the Federal government. *United States* v. *Gilliland*, 312 U.S. 86, 92 (1941) (quoting *United States* v. *Cohn*, 270 U.S. 339, 347 (1926)). Congress expanded the statute in 1934 by removing the text limiting the statute to falsehoods causing monetary harm, replacing it with the statutory requirement that the false statement be made "in any matter within the jurisdiction of any department or agency of the United States." *Id.* at 93; see *id.* at 92-94. That "broad language" covering any false statement made in "any matter" within the government's jurisdiction extended the statute's reach beyond matters "'in which the Government has some financial or proprietary interest'" to false statements that, *inter alia*, would pervert "'the authorized functions of government departments and agencies.'" *United States* v. *Rogers*, 466 U.S. 475, 480, 482 (1984) (quoting *Gilliland*, 312 U.S. at 91, 93); see

also *Brogan* v. *United States*, 522 U.S. 398, 403-404 (1998).[1]

In other words, "the phrase 'within the jurisdiction' merely differentiates the official, authorized functions of an agency or department from matters peripheral to the business of that body." *Rogers*, 466 U.S. at 479. This Court has "stressed that 'the term "jurisdiction" should not be given a narrow or technical meaning'" in this context, *id.* at 480 (quoting *Bryson* v. *United States*, 396 U.S. 64, 70 (1969)), and has concluded that a matter falls within agency's "jurisdiction" under Section 1001 if the agency "has the power to exercise authority in a particular situation." *Id.* at 479. "Jurisdiction" under Section 1001 thus "mean[s] simply the power to act upon information when it is received." *Ibid.* (quoting *United States* v. *Alder*, 380 F.2d 917, 922 (2d Cir.), cert. denied, 389 U.S. 1006 (1967)).

Congress's decision to expand the statute beyond false statements causing the government financial harm did not discard the statute's original concern with such statements, which continue to lie at the core of Section 1001. Moreover, this Court has held that an employee's false statements to his private-sector employer fall within Section 1001 where, as here, the employer was a

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[1] After this Court held that Section 1001 did not apply to false statements made in any matter subject to the jurisdiction of a federal court, see *Hubbard* v. *United States*, 514 U.S. 695, 715 (1995), Congress in 1996 again amended and expanded Section 1001 to apply to statement made in any matter "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States." See False Statements Accountability Act of 1996, Pub. L. No. 104-292, § 2, 110 Stat. 3459 (amending 18 U.S.C. 1001(a)); H.R. Rep. No. 680, 104th Cong., 2d Sess. 2, 8 (1996). That amendment did not alter the scope of the statute in a manner material to this case, which concerns false statements in a matter within the jurisdiction of the Executive Branch.

government contractor that "transmitted [the false statements] to a federal agency" in connection with its government contract. *Yermian*, 468 U.S. at 66, 75 & n.14 (holding that a defendant need not "actually kn[o]w that [his false statements] were being submitted to the Federal Government," at least where such transmission was reasonably foreseeable); see Pet. App. 9, 11 n.1 (explaining that false statements regarding government payments are unlawful even when the false statements pass through "intermediaries' hands" before reaching the government; concluding that petitioner "cannot do indirectly that which he is prohibited from doing directly"). Under this Court's decisions, therefore, petitioner's false statements, which were transmitted to the NSA and directly injured that agency by causing it to pay for services that it never received, concern a matter within the "jurisdiction of the executive branch."[2]

Moreover, as the court of appeals explained, "other, even more direct controls that the executive branch exercised" here demonstrate that petitioner's false statements were made in a matter within the jurisdiction of the executive branch. Pet. App. 12. The NSA had authority effectively to terminate petitioner's work on the NSA contract based on his submission of false timesheet information, because the NSA had authority to respond to such misconduct by suspending or revoking petitioner's access to the NSA facilities and classified information that petitioner needed to do his job. The NSA also had authority to obtain that timesheet information concerning petitioner to investigate such misconduct and could redress such actions by subcontactor person-

[2] Petitioner has not argued in his petition for a writ of certiorari that it was not reasonably foreseeable that his false statements would be transmitted to the NSA by his employer.

nel under its contract with Computer Sciences Corporation. See pp. 2-3, *supra*; C.A. J.A. 217-218. The NSA's "power to exercise authority in [this] particular situation" concerning the false timesheet information transmitted to it, including the NSA's "power to act upon [such] information when it is received," *Rogers*, 466 U.S. at 479-480, establishes that petitioner's false statements were made in a matter within the "jurisdiction" of the NSA.

2. Petitioner acknowledges that a number of the courts of appeals have concluded that false statements which cause payments to be made from "the public fisc" are sufficient to trigger Section 1001's jurisdictional threshold. Pet. 9-11 (citing Pet. App. 9-11). Petitioner, however, argues that three decisions—*Lowe* v. *United States*, 141 F.2d 1005 (5th Cir. 1944); *United States* v. *Blankenship*, 382 F.2d 1110 (11th Cir. 2004), cert. denied, 546 U.S. 828 (2005); and *United States* v. *Holstrom*, 242 Fed. Appx. 397 (9th Cir. 2007) (unpublished decision)—conflict both with that majority rule and with the court of appeals' decision in this case. Pet. 11-14. That contention lacks merit.

a. The Fifth Circuit in *Lowe* concluded that Section 1001's predecessor did not apply where Lowe falsely represented to his private employer the hours that he worked on a government shipbuilding project. The court concluded that the "alleged fact that the United States reimbursed the company for its payroll payments" under a shipbuilding contract was not "sufficient" by itself to trigger the statutory prohibition where the "control and supervision" of Lowe's duties fell within "the exclusive dominion of his private employer" and "every aspect of [Lowe's] employment was exactly the same as it would have been had there been no con-

tract with any government agency." 141 F.2d at 1006. Government contracts need not provide for direct reimbursement of a contractor's payroll expenses, and nothing in *Lowe* indicates that it would have been reasonably foreseeable that Lowe's false statements would have been transmitted to the government. The Fifth Circuit has accordingly treated its 1944 decision in *Lowe* as applying only where it "was not apparent whether the matters involving private contractors" involved a matter within the government's jurisdiction. *United States* v. *Baker*, 626 F.2d 512, 515 n.6 (1980); cf. *id.* at 514 & n.5 (finding Section 1001 applicable where employees' false statements regarding the time they worked on a federally funded project were transmitted to the federal agency that funded the project). As it is understood in the Fifth Circuit, *Lowe* does not conflict with the decision below.

The Eleventh Circuit's decision in *Blankenship* likewise does not support further review. In *Blankenship*, the U.S. Department of Transportation (USDOT) provided grants to the Florida Department of Transportation (FDOT) under a contract that required FDOT to ensure that 12% of the federal funds went to disadvantaged business enterprises (DBEs). 382 F.3d at 1116. FDOT, in turn, contracted with Granite Construction (a private company) to work on a federally funded highway project, requiring Granite to ensure that 12% of its subcontracts were set aside for DBEs. *Ibid.* Granite then subcontracted with H.J. Trucking (a DBE) but the subcontracts and associated materials contained false statements by H.J. Trucking and others that concealed the fact that another non-DBE company was simply exploiting H.J. Trucking's DBE license to perform the subcontracted work. *Id.* at 1116-1118. In that context, *Blank-*

enship explained that USDOT was "powerless to 'exercise authority' over either Granite or the defendants" who made the false statements; "lacked the power to compel either * * * to rescind or modify [their subcontracting] agreement"; and instead could look "solely to the FDOT to implement its contractual obligations" to the federal government. *Id.* at 1136-1137. That "embarrassingly weak and indirect avenue of recourse," the court reasoned, was insufficient to establish USDOT's authority over Granite and the defendants and, therefore, was insufficient to bring the matter within the jurisdiction of USDOT. *Id.* at 1137. *Blankenship* does not address circumstances where, as here, a defendant's false statements directly cause the government to make payments that it otherwise would not have made. And although the Eleventh Circuit in *Blankenship* criticized its own decisions (including prior binding Fifth Circuit precedent) indicating that the expenditure of federal funds will normally be sufficient to establish "jurisdiction" under Section 1001, *id.* at 1139-1140 & n.33, that intra-circuit tension does not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

In any event, the court of appeals correctly concluded that the NSA's authority to terminate petitioner's work on the contract based on his submission of false timesheet statements and its authority over the NSA contract distinguishes this case from *Lowe* and *Blankenship*, which addressed circumstances in which a federal agency had no similar authority over the matter at hand. Pet. App. 15. *Lowe* and *Blankenship* therefore do not address cases like this, where an Executive Branch agency not only is harmed financially by the defendant's false statement but also has the power to act

on the false information transmitted to it by taking action against the defendant both directly (by terminating the defendant's work on the government contract) and indirectly (through its exercise of contract rights).

b. Finally, petitioner relies (Pet. 11-12) on the Ninth Circuit's unpublished decision in *Holstrom*. That reliance is misplaced. The court in *Holstrom* concluded that Holstrom's submission of false time-card information to her government-contractor employer did not fall within the jurisdiction of the Department of Energy (DOE) because the government "failed to show that DOE had the 'power to act' with regard to Holstrom's allegedly false time card entries" and the evidence demonstrated that Holstrom's private-sector employer "was wholly responsible for 'the total performance under the contract' including all 'disciplinary action.'" 242 Fed. Appx. at 398-399. Under those circumstances, the court concluded that Holstrom's false statements were "not directly related to any DOE-authorized function," without discussing whether those statements were transmitted to DOE or caused DOE to make payments for work it never received. *Ibid.* *Holstrom* thus does not address the circumstances at issue here, where the NSA had several ways to exercise authority over petitioner's false statements. In any event, *Holstrom* is not a precedential decision, need not be followed in subsequent cases, see 9th Cir. R. 36-3(a), and thus does not reflect a division of authority warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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